IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-986

HAROLD E. BLACK, Superintendent,
Kentucky State Reformatory — PETITIONER

V.

JOSEPH EDWARD NIEMEYER,
LEROY D. TOLBERT — RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

ROBERT F. STEPHENS
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, Harold E. Black, respectfully prays that a writ of certiorari issue to review the judgment and order of the United States Court of Appeals for the Sixth Circuit decided November 1, 1977.

OPINION BELOW

The judgment and order of the United States Court of Appeals for the Sixth Circuit in this case is not reported. The order is setout in full in Appendix page 1a. The order adopted the memorandum objection of the district judge, which is set out in full in Appendix pages 1b thru 5b.

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was decided and filed on November 1, 1977. This petition for a writ of certiorari was filed within 90 days of that date. Jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

The question has three facets:

(1) Whether the federal district court properly declared a state court conviction void after the state supreme court had reviewed the judgement and affirmed having found constitution error was commited in the trial but was harmless beyond a reasonable doubt.

(2) Does the rule announced in *Stone v. Powell* extend to harmless error other than Fourth Amendment error?

(3) Can only a federal court make a finding with finality of harmless constitutional error in a state court trial?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved are the Fifth and Fourteenth Amendments. The statute involved is 28 U.S.C. §2254.

STATEMENT OF THE FACTS AND OF THE CASE

The respondents, Joseph Edward Niemeyer and Leroy D. Tolbert, were accused of taking part in a gang rape of Karen Zerhusen, which occured in lover's lane on November 22, 1969. The petitioners were indicted for rape and were tried in July, 1970. The jury returned a verdict of guilty and fixed the punishment at life. Judgment was entered on August 31, 1970. The petitioners took a belated appeal to the Supreme Court of Kentucky, and the judgment was affirmed by decision rendered on February 6, 1976. *Neimeyer v. Commonwealth*, Ky., 533 S.W.D.2d 218. (Appendix d.) A petition for federal habeas corpus was filed on the grounds that the petitioners were deprived of their Fifth Amendment rights against self-incrimination because the prosecutor sought to impeach their testimony in the trial by cross-examining them as to their silence at arrest and when identified by the prosecutrix.

The Supreme Court of Kentucky reviewed this same question on direct appeal and concluded that the prosecutor had in fact improperly questioned Niemeyer and Tolbert about their silence at arrest and had also improperly commented on the matter in his closing argument. In its opinion, the Supreme Courts of Kentucky reprimanded the prosecuter but held that the errors were harmless beyond a reasonable doubt under the standard of *Harrington v. Califorina*, 395 U.S. 250 (1969). Upon the findings of harmless error the judgement was affirmed.

The petition for federal habeas corpus was filed on July 6, 1976. The United States District Court assigned the case for preliminary review by a magistrate who recommended granting the writ. (Magistrate's Report and Recommendation, Appendix (c) .) Since there was no dispute as to facts, no evidentary hearing was held. The district court filed a memorandum opinion and entered judgement granting the writ of hebas corpus on January 20, 1977. (Appendix (b).) The magistrate and the district court agreed with the Supreme Court of Kentucky that Fifth Amendment error had been committed during the trial but did not agree that the error was harmless.

The appeal was taken to the Sixth Circuit Court of Appeals. In an order entered on November 1, 1977, the Sixth Circuit affirmed the judgement of the district court and adopted the opinion of the district judge. (Appendix (a).) It is from this order of the United States Court of Appeals for the Sixth Circuit that a review is sought.

REASON FOR GRANTING THE WRIT

This case presents a novel issue which has not been decided by the court. The Kentucky Supreme Court and the Federal District Court reviewed the same trial record to determine whether as a matter of law an admittedly constitutional error in the trial was harmless beyond a reasonable doubt according to the test set forth in *Harrington v. California.* 395 U.S. 250 (1969). They reached opposite conclusions.

This case differs from the host of habeas corpus cases where the constitutional question presented was resolved by a determination of facts. There is no dispute as to the facts, therefore, 28 U.S.C. §2254(d) has no bearing on this case. Both the state and federal court have concluded that error was commited but the state supreme court held the error was harmless and the federal district court held it was not harmless.

There is no decision of this court, to our knowledge, ruling on such an impasse, and one is needed in this case and in the interst of comity. *Doyle v. Ohio,* 426 U.S. 610 (1976), which dealt with the same kind of constitutional error, did not consider harmlessness because the state of Ohio did not raise the issue. The case most comparable to this case on the issue is *Stone v. Powell,* —— U.S. —— (1976) concerning the harmlessness of a Fourth Amendant violation. *Stone* and its companion case, *Wolff v. Rice,* are similar to this case in the following respects: all three are hebeas corpus cases attacking state court convictions; in each the state appellate court affirmed [in Stone and the case at bar on the basis of harmless error under *Chapman v. California,* 386 U.S. 18 (1967) and in *Wolff* on the holding of no error] ; in each the lower federal courts granted the writ. *Stone* and *Wolff* were reversed by this court, holding that fedral habeas corpus should not be granted when a claim of constitutional error under the Fourth Amendment and the exclusionary rule had been fully ligitated in the state court and decided adversely to the petitioner.

Another point of similarity between *Stone, Wolff*

and this case is that they all involve a court-made rule. This court made the *exclusionary rule* in the interest of Fourth Amendment rights. This court made the *harmless error rule* in *Chapman v. California,* 386 U.S. 17 (1967) and decreed that federal standards preempt all state harmless error statutes when the error is of constitutional provisions. The rule was made in the interest of judicial economy because -

> We conclude that there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction.
>
> 386 U.S. 22.

The rule was refined in *Harrington v. California,* 395 U.S. 250 (1969) to provide that 'overwhelming evidence of guilt would be weighty enough to satisfy the criterion of error 'harmless beyond a reasonable doubt.'

This court has never said that the harmless error rule could be applied only in federal habeas cases. *Chapman and Harrington* were not even habeas corpus cases. Nor has this court ever said that only a federal court may make a final determination on harmless error. What this court *has* said is that federal standards rather than state statutes must be applied by all courts, federal and state, when the error is of constitutional character.

The interposing of the judgement of lower federal courts, on the question of harmless error fully reveiwed

by state courts, by means of habeas corpus review, is in effect making a federal district court an appellate court superior to the highest state court on a harmless error question.

With the many refining rules on constitutional rights which have come into being in the natural course of events, there is scarcely a criminal trial about which some constitutional complaint cannot be alleged. No matter how unfounded or trivial it must be adjudicated somewhere by appellate review or collateral attack. If the federal courts have the exclusive power to decide a constitutional error is harmless, the Supreme Court should make it clear. And if such is the case, the statutory requirement of exhaustion of state remedies merely serves to delay the final disposition of a convict's claim. (The first petition for writ of hebeas corpus by these prisoners was filed in September, 1974. The first motion to vacate the judgement was filed in the state court in January, 1971.)

It is the belief of the petitioner that this court's intention, from the inception of the harmless error rule to the present, is that appellate courts review recognized constitutional error as to harmlessness, according to standards pronounced by this court; that on federal *habeas* review the court should first review the appellate record to see if (1) the alleged error was recognized and (2) if it was evaluated as to prejudice or harmlessness beyond a reasonable doubt; that if the state did not recognize the alleged error (*Doy'e v. Ohio,* 426 U.S. 610 (1976) or, 'recognizing it, failed to state that upon its

review of the entire trial record it believed that beyond a reasonable doubt the error was harmless, the federal court should review the trial record and make its own determination as to harmlessness; but otherwise, where the appellate opinion, as in this case, shows the state recognized the error and found it harmless because the evidence of guilt was overwhelming, the habeas petition should be dismissed on the strenght of the state appeliate decision. If we are right in this belief, the Sixth Circuit's decision affermining the judgement of the district court should be reversed.

The Sixth Circuit did not issue an opinion in this case but affirmed for the reasons stated in the Memorandum Opinion of the district court. (App. 1b; 1a) The district judge conceived it his duty to review the trial record and make his own decision on harmless error despite the fact that the Supreme Court of Kentucky had already declared the error harmless. The judge stated:

> Some day, the Supreme Court of the United States may decide that when a state tribunal has already passed on such an issue, there is no futher right to review by a federal district court on collateral attack. But this has only been applied to the Fourth Ammendment' guarantee against illegal searches and seizures. See Stone v. Powell, — U.S. —, 44 U.S.L.WK. 5313 (July 6, 1976). Until the Supreme Court speaks again, other constitutional rights are still appicable on collateral attacks, even though state tribunals have ruled adversely to the petitoner.
>
> App. 4 b

We think the judge was wrong in his opinion, but

be that as it may, his memorandum opinion invites the review the petitioner seeks.

In several recent decisions this court has shortened the road to finality in criminal litigation without materially impairing adjudication of constitutional rights e.g. *Stone v. Powell,* supra; *Wainwright v. Sykes,* —— U.S. ——, 53 L. Ed. 2d 594 (Dec'd June 23, 1977). In the latter case this court moved to have a state court trial perceived as a "decisive and portentous event." (53 L. 2*d* 610.' In *Stone* the court entrusted the complete state court system to decide Fourth Ammendment search and seizure matters after full ligation. In the light of these refinements in the interplay of the state and federal courts in matters of state criminal cases, we believe that certiorari should be granted on this probation.

The harmless error rule is a necessary part of criminal appellate review. Without it only constitutionally perfect trials will be acceptable, and our system of justice through the courts will be bogged down in trivialities. Reversals and retrials would be the rule rather than the exception. It is in the interest of the rule that this petition should be granted.

CONCLUSION

Petitioner submits that it is necessary for this court to review the decision of the Sixth Circuit which removes from the state courts the accommodation of the harmless error rule.

Respectfully submitted,

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PROOF OF SERVICE

I, Carl T. Miller, Jr. one of counsel for the petitioner, hereby certify that three (3) copies of the foregoing brief were mailed, postage prepaid, to Honorable J. Vincent Aprile, II, Assistant Public Defender, 625 Leawood Drive, Frankfort, Kentucky 40601, this 21st day of December, 1977.

Carl T. Miller, Jr.

CARL T. MILLER, JR. KC
ASSISTANT ATTORNEY GENERAL
Commonwealth of Kentucky

Appendix "A"

No. 77-1170

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JOSEPH EDWARD NIEMEYER, et al.

Petitioners-Appellees

v. **ORDER**

HAROLD E. BLACK, Superintendent,
Kentucky State Reformatory

Respondent-Appellant

BEFORE: WEICK and LIVELY, Circuit Judges; and CECIL, Senior Circuit Judge.

This is an appeal by a state officer from an order of the district court granting a petition for a writ of habeas corpus. Petitioner's state conviction was appealed to the Supreme Court of Kentucky, which found that constitutional error had occurred at the trial, but concluded that the error was harmless.

Upon examination of the record and consideration of the briefs and oral arguments of counsel this court concludes that the district court correctly found that the constitutional error which occurred at the state trial was not harmless beyond a reasonable doubt. Accordingly, the judgment of the district court is *affirmed* for the reasons set forth in the memorandum opinion of District Judge Eugene E. Siler, Jr. dated January 5, 1977.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman, Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 76-50

JOSEPH EDWARD NIEMEYER
LEROY D. TOLBERT **PLAINTIFFS,**

VS: **MEMORANDUM OPINION**

HAROLD BLACK, SUPERINTENDENT
KENTUCKY STATE REFORMATORY **DEFENDANT**

This Court adopts by reference the Magistrate's Report and Recommendation in full with certain additional comment which needs to be made in this case.

The crime involved here was heinous indeed. While the prosecutrix was sitting with her fiance in an automobile, several males attacked her fiance and dragged her into another vehicle, where she was beaten and gang-raped. Some five or six assailants participated, but the prosecutrix could only identify four, one of whom committed suicide before trial. The three remaining were convicted of rape and given a life sentence in 1970. Two of those convicted have filed this petition for a writ of habeas corpus.

The key testimony in the trial was that of the prosecutrix, who positively identified the petitioners as participants in the rape. Her fiance identified petitioner Niemeyer and one other, Southworth, the one who committed suicide. There was also evidence of bloody underclothing on the third co-defendant, Northcutt, who ad-

mitted on the stand he got in the back seat of the car with the prosecutrix but did not have sexual relations with her. All three admitted being at the scene and in the vehicle where the rape took place, but denied having sex with the victim, placing the blame on the deceased assailant and two other males who were not arrested with them on the night of the rape. Additionally, within a short time after the rape, the petitioners, along with Northcutt and Southworth, were stopped near the scene in a car, meeting the description given the police by the prosecutrix and were identified by her soon thereafter.

The point raised in this petition is the comment by the Commonwealth's Attorney on the silence of the defendants and their failure to deny their guilt at the time of arrest and identification. This comment was made in both the opening and closing statements for the Commonwealth and in cross examination of each of the defendants. See *Niemeyer v. Commonwealth,* 533 S.W.2d 218 (Ky. 1976).

This was clearly unconstitutional under *Doyle* v. *Ohio,* — U.S. —, 96 S.Ct. 2240, 49 L.Ed. 2d 91 (1976). and the Commonwealth has conceded this. However, the Supreme Court of Kentucky, though chastising the Commonwealth's Attorney for such conduct, nevertheless found the error to be harmless beyond a reasonable doubt under *Chapman v. California;* 386 U.S. 18 (1967). See *Niemeyer v. Commonwealth, supra.* The question before this Court, therefore, is whether the error was harmless beyond a reasonable doubt.

Apparently, there are situations where such error can be harmless. The Supreme Court implied it when

it said that the state did not assert harmless error in *Doyle v. Ohio, supra.* Moreover the Sixth Circuit has found harmless error in this type of case in *Meeks v. Havener,* ——— F.2d ——— (No. 74-2288, Nov. 18, 1976), where there was little testimony on the failure of the defendant to make a statement and there was no prosecutive comment on it. *Cf. Berryman v. Colbert,* 538 F.2d 1247 (6th Cir. 1976).

On the other hand, in the case at bar, the prosecutor, over the repeated objections by defense counsel, emphasized the silence of the defendants over and over, implying such silence after arrest indicated guilt. He even asserted their silence upon being identified by the proscutrix, even though the defendants were not in a position to know that they had been identified by her. This was later clarified in the testimony, but the other instances related were examples of prosecutive overkill.

Had Kentucky law been contrary at the time, the prosecutor may have been justified in his cross-examination and remarks to the jury. Surely, Kentucky set down the rule in 1971 in *Cessna v. Commonwealth,* 465 S.W.2d 283, where the Court of Appeals held that silence by an accused who has been advised of his rights under *Miranda v. Arizona,* 384 U.S. 436 (1966), cannot be used against him. Of course, it is all based on the *Miranda* case, decided long before this trial in Kenton County. Moreover, at the time of the trial, this circuit had already held that such comments and cross-examination were unconstitutional in *united States* v. *Brinson,* 411 F. 2d 1057 (6th Cir. 1969).

Instead, this case is similiar to *United States v. Harp,*

536 F.2d 601 (5th Cir. 1976), where comments on post-arrest silence was condemned. Moreover, the rights under *Doyle* apparently are retroactive, at least back to *Miranda*. *Cf. United States v. Impson*, 535 F.2d 287 (5th Cir. 1976), which applied the federal rule from *United States v. Hale*, 422 U.S. 171 (1975), to cases tried before 1975.

As urged by the Commonwealth, this Court gave great weight to the decision in *Niemeyer v. Commonwealth, supra*, by the Kentucky Supreme Court that it was harmless error, but this Court is not convinced of it in view of the fact that the silence was hammered into the jurors' mind from start to finish in the trial. Some day, the Supreme Court of the United States may decide that when a state tribunal has already passed on such an issue, there is no further right to review by a federal district court on collateral attack. But this has only been applied to the Fourth Amendment's guarantee against illegal searches and seizures. See *Stone v. Powell*, —— U.S. ——, 44 U.S.L. Wk. 5313 (July 6, 1976). Until the Supreme Court speaks again other constitutional rights are still applicable on collateral attacks, even though state tribunals have ruled adversely to the petitioner.

Under the facts of this case, it is distasteful for this Court to issue a writ, as retrials are difficult after some six or seven years. Possibly, the offenders will never be retried, as the prosecutrix may be reluctant to testify again. It may be that, as stated by Justice (then Judge) Cardozo, "[t]he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926). Nevertheless, "[n]othing can de-

stroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. *Mapp v. Ohio*, 367 U.S. 643 (1961).

By a separate order, this Court will issue a writ of habeas corpus with a stay of one hundred-twenty (120) days within which the petitioners are to be retried, or else they are to be released on a writ after that period of time. If the defendant desires a further stay pending appeal, this Court will entertain such a motion and such a stay will be in addition to the one hundred-twenty (120) days granted by this order.

This 5 day of January, 1977.

/s/ Eugene E. Siler, jr.

EUGENE E. SILER, JR., JUDGE

A True Copy Attest

Davis T. McGarvey, Clerk
U. S. District Court

/s/ By Mary H. Yelton, D.C.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
COVINGTON

CIVIL ACTION NO. 76-50

JOSEPH EDWARD NIEMEYER
LEROY D. TOLBERT **PETITIONERS,**

VS.

HAROLD E. BLACK, Superintendent,
KENTUCKY STATE REFORMATORY **RESPONDENT.**

Petitioners were tried and convicted of rape in the Circuit Court of Kenton County, Kentucky and their sentences fixed by that court at life imprisonment. The question presented by collateral attack pursuant to 28 U.S.C. §2254 concerns the admission of testimony clicited by the Commonwealth's Attorney during his questioning of the prosecutrix, the arresting officer and petitioners, as well as comments made by the prosecutor during his closing argument. In accordance with 28 U.S.C. §636(b) and pursuant to a General Order of this Court, the matter has been referred to the undersigned United States Magistrate for preliminary review within the scope authorized by *Wingo v. Wedding*, 418 U.S. 461 (1974).

As noted by the Kentucky Supreme Court on direct appeal, *Niemeyer v. Commonwealth*, Ky. 533 S.W. 2d 218

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1. Although never raised before, the record also reveals that the Commonwealth's Attorney also made reference to petitioner's silence during his opening argument (Tr. 45).

(1976), petitioners were allegedly among a group of men who participated in the brutal gang-style rape of Karen Zerhusen, the prosecutrix. Miss Zerhusen and her fiance were seated in a car parked in Kenton County. The men dragged her from the car, forced her into their automobile, and drove to another location where she was beaten and repeatedly raped. Petitioners acknowledged their presence at the scene of the crime but denied any participation in the rape and also claim to have been unable to prevent the rape because they were either too drunk or drugged. They were arrested shortly after the crime and identified by the prosecutrix as participants in the rape.

During trial the Commonwealth's Attorney questioned Miss Zerhusen and the arresting officer about petitioners' failure to deny their guilt both at the time of arrest and at the time of identification. Both petitioners were questioned by the Commoswealth's Attorney on cross-examination concerning their failure to provide exculpatory evidence. Finally, the Commonwealth, Attorney made direct reference to petitioners' refusal to deny guilt. The objectionable matters are quoted in detail by the Kentucky Supreme Court in its decision affirming petitioners' conviction, *Niemeyer*, Id. at 219-221, and therefore, for the sake of brevity need not be recited here.

Even though the Kentucky appellate court found constitutional error to have been committed in the admission of evidence pertaining to petitioners' silence in the face of accusation and the comments of the prosecu-

tor, *United States v. Hale*, 422 U.S. 171 (1975),[2] that error was categorined as harmless. In reaching their conclusion, the court stated that it had to consider "whether upon the whole case there is a substantial possibility that the result would have been any different." *Niemeyer supra* at 221-222. However, before a constitutional error can be classified as harmless, an appellate court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24 (1967); *Berryman v. Colbert*. — F.2d —, No. 75-1413 (6th Cir. Decided July 21.1976). To reach such a conclusion here, this Court must on what would be the probable impact of the constitutionally infirm evidence and argument upon the minds of an average jury, *Harrington v. California*, 395 U.S. 250, 254 (1969), and conclude that absent such evidence "no juror could have entertained a reasonable doubt as to petitioners' guilt." *Minor v. Black*, 527 F.2d 1, 5 (6th Cir. 1975), *cert denied*, ——— U.S. ———, 44 LW 3746 (1976).

Récognizing that the ultimate decision rests with the Court, the Magistrate without attempting to usurp that function has reviewed the entire state record incluading the transcript of the proceedings and respectfully recommends that a writ of habeas corpus issue on condition for the reasons which follow.

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2. Subsqeuent to the Kentucky Supreme Court's decision, the United States Supreme Court in **Doyle v. Ohio**, —— U.S. ——, 44 LW 4902 (Decided June 17, 1976) applied the rationale of **United States v. Hale**, 422 U.S. 171 (1975) to the states by holding the use of a defendant's post-arrest silence to be violative of the Constitution.

Here the Commonwealth's Attorney argued petitioners' silence to the jury in a manner as to warrant official and public reprimand by the Kentucky Supreme Court which classified his actions as an inexcusable example of abuse by a public prosecutor. *Niemeyer, supra* at 222. Where error has been found to be prejudicial, and hence reversible, there has usually been such argument, often extensive and strongly worded. See, *e.g., Minor, supra; Fwole v. United States* 410 F.2d 48 (9th Cir. 1969), *of. Scarborough v. State of Arizona*, 531 F.2d 959 (9th Cir. 1976). Yet where evidence of guilt has been "over whelming" courts have found erroneous references to pre-trial silence are harmless even with some, albeit minimal, closing argument reference to that silence. *Leake v. Cox, 432 F.2d 982,* 983-984 (4th Cir. 1970); *United States* v. *Wick,* 416 F.2d 61, 62 (7th Cir.), *cert. denied* 396 U.S. 961 (1969). If the Court were to ignore the closing comments of the Commonwealth's Attorney or to downplay their significance, the inculpating evilence offered against petitioners can hardly be described as overwhelming. While the Magistrate does not agree with petitioners' contention that the prosecutrix's identification of them was fraught with so many inconsistencies as to make it unreliable, it likewise cannot be said that it was incontrovertible when there was evidence that she was understandably distraught at the time of and shortly after the time of the "alley confrontation" of the petitioners. Moreover, there was no physical evidence obtained linking these petitioners with the actual rape whereas blood was found on their co-defendant's underwear. Furthermore, their testimony, concededly self-serving and weak,

could have provided a basis for their acquittal. In summary, the jury was faced with resolving a conflict between the prosecutrix's identification of the petitioners as active participants in the crime or their disclaimer of any participation.

Finally, with all respect to the wisdom of the Kentucky Supreme Court, the Magistrate finds no special significance in the jury's action in splitting the middle when imposing sentence. To be sure, a strained inference may be drawn from the jury's imposition of more than the minimum sentence that they didn't accept petitioners' statements. On the other hand, an equally tortured inference may be drawn from the failure to impose the maximum sentence that they retained some doubt as to petitioners' participation.

Since the question before the Court may be resolved through perusal of the state court transcript, it is submitted that no evidentiary hearing need be held. 28 U.S.C. §2243. It is respectfully recomended, however, that a writ of habeas corpus issue unless the Commonwealth elects to retry petitioners within a reasonable time..

This the 15th day of September, 1976.

/s/ Joseph M. Todd
United States Magistrate

A True Copy Attest
Davis T. McGarvey, Clerk
U. S. District Court
By: ---------- D. C.

APPENDIX D

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Rendered; February 6, 1976

SUPREME COURT OF KTNTUCKY
75-287

JOSEPH EDWARD NIEMEYER AND LEROY D. TOLBERT — **APPELLANTS**

V. **APPEAL FROM KENTON CIRCUIT COURT**
HON. MELVIN T. STUBBS, JUDGE
INDICTMENT NO. 14988

COMMONWEALTH OF KENTUCKY — **APPELLEE**

OPINION OF THE COURT BY JUSTICE PALMORE

AFFIRMING

The appellants, Niemeyer and Tolbert, were tried and convictsd of rape and their sentences fixed at life imprisonment. The only serious question presented by their appeal concerns the admission of testimony elicited by the Commonwealth's Attorney during his questioning of the prosecutrix, the arresting officer and the appellants, and comments made during his closing argument.

Niemeyer and Tolbert were among a group of men who participated in rhe gang-style rape of Karen Zerhusen, he proscutrix. At the time of the assault she and hre finance were seated in a car parked in Kenton County. The men dragged her from the car, forced her

into their automobile, and then drove to another location, where they beat and repeatedly raped her. Her finance also was beaten by the men. The appellants acknowledged their presence at the scene of the crime but denied any participation in the rape. They claimed to have been unable to prevent their associates from raping the victim because they weere "too drunk or somethisg." They were arrested shortly after the crime and were identified by both the prosecutrix and her fianc as and were identified by both the prosecutrix and her fiance as participants.

During the trial the Commonwealth's Attorney, over objection by defense counsel, questioned both the prosecutrix and the arresting officer about the appellant's failure to deny their guilt at the time of ithe indentifcation procedure and at the time of the arrest:

DIRECT EXAMINATION OF PROSECUTRIX BY COMMONWEALTH

"DQ 205. In your presence, and in the prescene of the police officers, and in the presence of the Defendants there,did either of the three Defendants, Niemeyer, Northcutt or TOLbert, deny that they had done it, after you accused them - - - -

DEFENDANTS' OBJECTION: "We object."

RULING OF THE COURT: "Overruled."

"DQ 206. After you accused them of it, did they deny that they had done it?

"A. Well, when I was in the police cruiser and I identified each one, then that was it. - - - -

"DQ 207. (Interposing) I' asking you, did they deny it?"

DEFENDANTS' OBJECTION: "Jusa a minute."

"DQ 209. Did you hear any denial?"

DEFENDANTS' OBJECTION: "We object." Judge"

RULING OF THE CONRT: "Overruled."

DIRECT EXAMINATION OF OFFICER GALL BY COMMONWEAITH

"DQ 55. Name them, again.
and Mister Northcutt.

"DQ 56. And did they make any denial of the identification by her?

DEFENDANTS' OBIECTION: "We object."

RULING OF THE COURT: "Overruled"

DEFENDANTS' RESPONSE: "Judge, there hasn't been a proper foundation laid."

RULING OF THE COURT: "Overruled."

"A. No, sir.

"DQ 57. What happened then?

"A. They were placed under arrest at that time for rape."

The defense attorney then elicited on cross-examination from the arresting officer that actually Niemeyer and Tolbert had been unable to see or hear the prosecutrix during identification process at the police station:

CROSS-EXAMINATIUN OF OFFICER GALL BY DEFENSE COUNSEL

"CQ 7. And Mister O'Hara twice said that Karen Zerhusen identified these boys who sit here at the table, and they didn't say anything, they didn't deny the charge; now I want you to tell this Jury were these three Defendants in her presence and knew what she was doing at the time she identified them when she first identified them?

"A. At the first time she identified them I don't believe they knew.

"CA 8. They didn't know what she was doing with you, did they?

"A. No, sir she was in the automobile.

"CQ 9. Now out at the Kenton County Police Station you had her looking through a window where she could see them, and they couldn't see her didn't you?

"A. Yes, sir.

"CQ 10. So, they didn't know that she was identifing them at the police station?

."A. No, sir.

"CQ 11. Well, what do you mean by telling this Jury that they didn't deny the charge of rape when this woman identified them?

"A. They didn't deny it.

"CQ 12. Well, they didn't know they were being identified, did they?

"A. I don't believe that they did."

Niemeyer and Tolbert were both questioned by

the Commonwealth's Attorney about the failure to offer any exculpatory information when they were identified by the prosecutrix and when they were arrested:

CROSS-EXAMINATION OF TOLBERT BY COMMONWEALTH

"CQ 39. Who did have intercourse with Karen Zerhusen, Mister Tolbert?

"A. Meagher, Combs and Southworth.. and Northcutt tried.

"CQ 40. Now isn't that amazing."

DEFENDANTS' OBJECTION: "Now, Judge, we object to these comments."

RULING OF THE COURT: "I'll sustain. Sustained."

"CQ 41. I suppose you told the police that, that night."

DEFENDANTS OBJECTION: "We object."

"A. No, sir."

RULING OF THE COURT: "Overruled."

"CQ 42. Why?

"A. Why should I?

"CQ 43. You were asked, weren't you?"

DEFENDANTS' OBJECTION "We object,

RULING OF THE COURT: "Overruled"

"CQ 44. Weren't you?

"A. Yes.

"CQ 45 You didn't say anything, did you?

"A. No, sir."

"CQ 46. You didn't deny that you did it; did you?

DEFENDANTS' OBJECTION' "Now, Judge, I ----"

RULING OF THE COURT: "I'll Sustain your objection. I,ll sustain the objection. Continue with the trial."

CROSS-EXAMINATION OF NIEMEYER BY COMMONWEALTH

"CQ 42. I suppose you told the police, when they came, this story about Mister Meagher and Mister Combs?

"A. No, sir.

"CQ 43. They asked you if you wanted to make a statement?""

DEFENDANTS' OBJECTION: "We Object"

RULING OF THE COURT: "Overruled"

The attorney for the Commonwealth made direct reference in his closing argument to the appellants, refusal or failure to deny guilt at the time the identifications were made and at the time of arrest:

"Today, July the 9th, 1970, roughly eight months after the commision of this offense, these Defendants come into court and say, 'I didn't do it. Meagher did it, Combs did it, and a dead man did it.' If you were accused of a crime that was going to deprive you of your liberty, for the rest of your life, without parole, without parole, because that's what we're to do, would wait eight months, eight weeks, eight days, eight seconds to say to the police officer, 'Now, wait a minute. I was there, but I didn't do it. The two little guys who escaped, and Southworth did it.' Would you do that? Well, if you didn't, you wouldn't be living a normal life. And had they done that, I can assure you, that the Sergeant Galls and the Patrolmen Reimers, and the Patrolmen Hattons, and yes, the Commonwealth's Attorney's office, for those of you who might know my reputation, would have left no stone unturned to bring to the Bar of Justice those culprits, provided the proof could be established. But no, even when they are accused on the scene, they don't utter a word."

DEFENDANTS' OBJECTION: "Judge,

we object. We object to that statement, Judge."

INQUIRY BY THE COURT "----they don't utter a word?"

The admission of evidence pertaining to the appellants' silence in the face of accusations and the comments of the Commonwealth's Attorney constitute serious error. Appellants had been advised of their *Miranda* rights and were not required to make any statements concerning their guilt or innocence. The efforts of the prosecution to impeach each appellant by reference to his silence at the time of identification and at the time of arrest plainly violated his Fifth Amendment right to remain silent.

This court has said previously that the fact that an accused is under arrest and has the benefit of *Miranda* is sufficient to render inadmissible any accusatory statements in his presence even though he chose to remain silent. Cessna v. Commonwealth, Ky., 465 SW 2d 283, 285 (1971). Although *Cessna* involved the apparent adoption of a statement by the defendant's wife, the principle of that case is appicable here. Evidence of the appellants' failure to make exculpatory statements during the identification procedure or at the time of arrest after *Miranda* warnings are issued cannot be admitted at trial

The United States Supreme Court has recently addressed this problem in Hale v. United States, 422 U.S. 171, 45 L. Ed. 2d 99, 95 S. Ct. 2133 (1975). In the ex-

ercise of its supervisory powers over the federal courts that court observed that the potential for prejuidce outweighs the probative value of evidence of silence by the defendant at the time of arrest. It said also that permitting the defendant to explain the reasons for his silence is not likely to overcome the strong negative interfence the jury is likely to draw from the silence. Despite the fact that the errors committed in this case involve the appellant's constitutional rights, such errors are not necessarily prejudicial, thus requiring reversal. Harrington v. California, 395 U.S. 250, 23 L. Ed. 2d 284, 89 S. Ct. 1726 (1969). Watkins v. Commonwealth, Ky., 465 SW 2d 235 (1971). In determining whether an error is prejudical an appellate court must consider whether upon the whole case there is a substantial possibility that the results would have been any different. Abernathy v. Commonwealth. Ky., 439 SW 2d 949, 952 (1969).

Two important circumstances in making such a determination fixed by the weight of the evidence and the degree of punishment fixed by the verdict. The evidence presented in support of the appellant's guilt in the instant case was over whelming. They admitted their presence at the crime scene in the company of two other men who did rape her. The only evidence offered in defense was their testimony relating to alcohol or drug-iuduced inability to restrain their associates from carrying out the rape.

The penality imposed by the jury was not the minimum sentence, but "split the middle" between life without parole and ten to twenty years in the penitentiary.

KRS 435.090. It is our conclusion beyond a reasonable doubt that the errors and irregularities were not prejudicial.

Some of the constructions placed by the United States Supreme Court in recent years upon various protections guaranteed to individuals by the Constitution have brought dismay and discouragement to those charged with enforcing the laws against crime. Nevertheless, that court is the final authority in the field of federal constitutional jurisprudence, and what it has said on the subject of the right of silence not only is and was the law of this case, but well before the trial of this case had been expressed in no uncertain terms by its celebrated (and as often execrated) opinion in Miranda v. Arizona, 384 U.S. 436, 468, fn. 37 (1966), as follows:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation."

One of the finest offices the public can give to a member of the legal profession in this state is that of Commonwealth Attorney. Its very status becomes a mantle of power and respect to the wearer. Though few are apt to wear it lightly, some forget, or apparently never learn, to wear it humbly. No one except for the judge himself is under a stricter obligation to see that every defendant receives a fair trial, a trial in accordance with the law, which means the law as laid down by the duly

constituted authorities, and not as the prosecuting attorney may think it ought to be.

We consider this to be an inexcuseable example of of abuse by a public prosecutor. Officially, publicly, and as a word to other similar officers, we disapprove of and condemn it.

The judgement is affirmed.

All concur except Lukowsky, J., who did not sit.

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